92-2039

No. _____

Supreme Court, U.S.
FILED
JUN 22 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

ROBERT WELLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH ANOTHER DECISION OF THAT COURT ON THE SAME MATTER.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

Cases iv

Constitutional Provisions iv

Statutes iv

Rules v

OPINION BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 26

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ... 26

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH ANOTHER DECISION OF THAT COURT ON THE SAME MATTER 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)..... 26

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)..... 26

Dudley v. Duckworth, 854 F.2d 967 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989)..... 28

United States v. Hill, 953 F.2d 452 (9th Cir. 1991) .29, 30

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)..... 21

Yates v. Evatt, ___ U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)..... 26

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution..... 2

Fifth Amendment, United States Constitution..... 2

STATUTES

Title 18 U.S.C. § 2.....23, 24

Title 18 U.S.C. § 371..... 24

Title 18 U.S.C. § 1623..... 25

Title 18 U.S.C. § 3231..... 2

Title 21 U.S.C. § 841(a)(1).....23, 24

Title 21 U.S.C. § 846..... 24

Title 21 U.S.C. § 854..... 24

TABLE OF AUTHORITIES – Continued

Page

Title 21 U.S.C. § 855 24

Title 26 U.S.C. § 7206(2) 24

Title 28 U.S.C. § 1254(1) 2

RULES

Fed.R.Evid. Rule 403 ..... 26, 29

SUP.CT.R. 13.4 2

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ROBERT WELLS,

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To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner ROBERT WELLS respectfully prays that a Writ of Certiorari issue to review the unpublished opinion and judgment entered by the United States Court of Appeals for the Ninth Circuit on March 1, 1993, styled United States of America v. Robert Wells,[1] 9th Cir.

OPINION BELOW

The unpublished opinion of the court of appe styled *United States of America v. Robert Wells* and numb..ed Cause

[1] Also named as Defendants-Appellants were William Mitchell Nowlin, Daniel Aloysius Jones, and William Dee Morris.

No. 91-30468, was entered on March 1, 1993. A copy of the opinion is attached hereto as Appendix A.

On March 24, 1993, the court of appeals denied appellant's petition for rehearing. A copy of the order is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 1, 1993. Thereafter, on March 24, 1993, appellant's petition for rehearing was denied. This petition is filed within ninety (90) days from the date of the denial of said petition. SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

In 1979, Gary Lincoln (Lincoln), a special agent with the Federal Bureau of Investigation (FBI), began receiving

numerous allegations and complaints from law enforcement officials concerning the methamphetamine traffic between Idaho and Montana, and requests that the FBI try to do something about it. As a result, an investigation was initiated.

In the early 1980's Don Wogamon (Wogamon) first came to the attention of the FBI when Lincoln learned that Wogamon, who had been released from prison in September, 1981, had returned to Townsend, Montana, and without any apparent means of support, had completely remodeled an old two-story home, had also commenced extensive travel, and the methamphetamine traffic in the Butte area appeared to increase. Suspicions were heightened in 1983-84 when it was learned that Jack Biggs (Biggs), a known methamphetamine dealer, had arrived in Townsend and was associating with Wogamon. Then, in February 1985, Lincoln was contacted by an individual by the name of Douglas Alan Medici (Medici), who requested an interview with him. Medici, who was under arrest at the time for possession of prescription drugs and was also on probation for a felony theft conviction, was a major drug trafficker and agreed to become an informant for the FBI. Medici had become acquainted with Wogamon through Biggs, and had received methamphetamine from both Wogamon and Biggs in the past.[2] Medici admitted that around Easter, 1984, he purchased a quarter-pound of methamphetamine from Wogamon and subsequently sold four ounces of this methamphetamine for $4,000 to Karen Murphy Taylor.[3] On April 6, 1984, a search warrant was executed at the home of Charles and Karen Murphy Taylor, located at 530 Colorado Street, in Butte, Montana, and approximately four (4) ounces of methamphetamine were seized. Medici continued to purchase quarter-pounds to pounds of methamphetamine from Wogamon for the next two years.

The following month, on March 11, 1985, without telling Lincoln, Medici purchased a pound of methamphetamine from

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[2] Medici initially received his methamphetamine from Biggs who was receiving it from Wogamon.

[3] On March 28, 1984, Karen Taylor withdrew $4,000 from her savings account.

Wogamon and attempted to sell it. The quality of the methamphetamine was poor, so Medici told Lincoln about the purchase and on March 20, 1985, turned the methamphetamine over to him.

On the same day, Medici contacted Wogamon and recorded several telephone conversations in which he attempted to discuss the poor quality of the pound of methamphetamine he had received, and to purchase more methamphetamine from him. The next day, on March 21, 1985, Medici met with Wogamon and his wife, Elizabeth, at Fairmont Hot Springs to discuss the quality of the pound of methamphetamine that he had purchased. Later, on April 29, 1985, Medici had another meeting with Wogamon at the Spirit Shop in Butte, Montana, to further discuss the bad methamphetamine. During this meeting, Medici was wearing a body recorder to intercept their conversation. The meeting lasted approximately 40 minutes.

Jon Montgomery stated that during the years of 1984 through 1986, Tim Wogamon (Tim)[4] and Ben Sautter supplied him with methamphetamine in quantities ranging from a quarter-pound to two pounds.

On May 14, 1987, Thomas McDaniel (McDaniel), a special agent with the FBI who was assisting Lincoln in the methamphetamine investigation, received a sample of suspected methamphetamine from Mike Hertzog (Hertzog). Hertzog admitted that he received methamphetamine from Tim on several occasions in 1984 and 1985. Tim also admitted that he delivered methamphetamine to Hertzog on two or three occasions, the last time being the fall of 1985.

In the fall of 1983, Wogamon approached Lloyd Arlyn Wilhelm (Wilhelm)[5] telling him that he had access to "quite alot of money," and that he felt they should put a company together. Wogamon told him that an individual by the name of Danny Jones was willing to put up $10,000 to start the corporation, and that Jones would put in a substantial amount

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[4] Tim Wogamon was Don Wogamon's adopted son.

[5] Wogamon was married to Wilhelm's son-in-law's step sister.

of money, approximately $200,000, after the corporation was formed. He also stated that an individual by the name of Bobby Fletcher was going to invest in the business.[6] Wilhelm discussed the matter with his brother-in-law, Martyn Salusso (Salusso), and on January 17, 1984, the business known as Medallion Minerals was incorporated in the State of Utah. The original directors and stockholders included Wilhelm, Salusso, and Don and Steve Wogamon (Steve),[7] and the goal of the business was to make money through mining. Wilhelm stated that on several occasions, Wogamon would be in possession of a briefcase full of cash, as much as $100,000, and he would help count it. The money would then be given to Steve.[8] Wogamon told Wilhelm that the money represented gambling proceeds.

Medallion Minerals Incorporated opened an account at the Bank of Montana Butte (formerly the Miner's Bank of Montana) on November 2, 1984. At the time the account was opened, Wilhelm, Salusso, and Steve and Don Wogamon were the persons who had signatory authority. From November 2, 1984, until the end of the year, December 31, 1984, there were twenty-three (23) currency deposits into the Medallion account amounting to $189,600. During 1985, there were a total of sixty (60) currency deposits into the Medallion account amounting to $511,400. None of the currency deposits in either 1984 and 1985 were in excess of $10,000. The account was closed February, 1986.

Medallion Minerals Incorporated also opened an account at the First National Bank of Twin Bridges, Montana, on March 9, 1984, with a $10,000 deposit. The same four individuals were authorized on the signature card. From the date the account was opened until the end of that year, December 31, 1984, there were a total of thirty-six (36) currency deposits into the Medallion account amounting to $295,050.

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[6] Appellant sometimes used the name "Robert Fletcher".

[7] Steve Wogamon is the brother of Don Wogamon.

[8] Steve also testified that Don Wogamon would often return from a trip with large sums of cash, sometimes as much as $100,000.

Three deposit slips bore the name of "Robert Wells".[9] During 1985, there were a total of ten (10) currency deposits into the Medallion account amounting to $93,525.

Medallion Minerals Incorporated also opened an account at the Montana Bank of Butte, Montana, on April 3, 1985, with a cash deposit of $9,500. Again, the same four individuals were authorized on the signature card. From the date the account was opened until the end of that year, December 31, 1985, there were a total of forty-three (43) currency deposits into the Medallion account amounting to $337,136.37.[10] The account was closed on March 12, 1986.

Medallion Minerals Incorporated also opened an account at the Norwest Bank of Butte, Montana, on April 3, 1985. The same four individuals were authorized on the signature card. From the date the account was opened until the end of that year, December 31, 1985, there were a total of twenty (20) currency deposits into the Medallion account amounting to $184,500.

On October 14, 1983, a checking account was opened at the State Bank of Townsend, Montana, in the name of Gold Hill Placers Incorporated. Wogamon and Harold Reed were the signators of the account. On September 16, 1986, the signatory authority was changed to Steve Wogamon, Robert Campbell, and Elizabeth Wogamon. Currency deposits of $5,000, $7,500, and $5,000 were made into the account on December 18, 1984, December 19, 1984, and December 27, 1984 respectively.

On March 18, 1985, and March 19, 1985, cash deposits of $9,500 each were made into the checking account of Elizabeth and Donald Wogamon at the American Federal Savings and Loan Bank in Helena, Montana. And, on March 18, 1985, a cash deposit of $9,500 was made into the account

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[9] The dates and amounts of these deposits were: October 11, 1984, in the amount of $9,000; October 12, 1984, in the amount of $9,000; and October 16, 1984, in the amount of $7,000.

[10] The last cash deposit was made on October 23, 1985.

of Steven E. or Barbara J. Wogamon at the Bozeman office of the American Federal Savings and Loan Bank.

In the spring of 1984, Tim Wogamon and his friend Benjamin F. Sautter[11] drove to Las Vegas to deliver a pound of methamphetamine to Wogamon. Tim met Wogamon in a hotel and handed him the methamphetamine, which was in a brown bag. Danny Jones was with Wogamon when this occurred.

During 1984, Tim began delivering methamphetamine in quantities of half a pound to a pound to an individual by the name of Jon Montgomery in the state of Wyoming. Sautter would make some of the deliveries for Tim. Tim was ultimately arrested for delivery of methamphetamine in the state of Wyoming in 1987.

In February, 1985, Tim and Wogamon travelled to Concord, California, to locate appellant, who was going to invest money in the Medallion corporation. They met with appellant and Danny Jones in a motel room. Wogamon, appellant, and Jones discussed business, and then appellant and Jones left the motel and the Wogamons returned to Montana. Don told Tim that appellant was going to invest some money in the corporation, but that Jones did not want to. Approximately 2-3 weeks later, Tim returned to Oakland, California, met with appellant, and drove a truck containing $80,000 back to Montana.

Tim quit working for his father and the Medallion corporation in May, 1985, because the business was slow and he was having problems receiving his pay. He did, however, continue delivering methamphetamine to Jon Montgomery the remainder of the year.

The following year, 1986, Tim became aware that the FBI was investigating his father and the Medallion corporation.[12] Tim met with his father, Elizabeth Wogamon, and William Dee Morris at his father's home in Butte, Montana.

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[11] Sautter and Tim were involved in the distribution of meth in the states of Wyoming and Montana during 1984 and 1985.

[12] In March, 1986, Medallion Minerals Incorporated filed for bankruptcy.

Certain records were changed to reflect more work days on the part of Tim, thereby accounting for more production of gold, and income, for the corporation.

In May, 1986, Wogamon called Tim and asked him to come to California and take Elizabeth and their daughter back to Montana. Tim was unable to leave at the time, so he asked Sautter if he would pick them up. Sautter agreed, picked Elizabeth and their daughter up in California, and brought them to Montana. Along with personal belongings, five pounds of methamphetamine and cut were also brought from California.

In February, 1986, Darryl Watkins (Watkins), a criminal investigator with the Internal Revenue Service, began to undertake an undercover role in the investigation into the Medallion corporation. Using the alias "Floyd Tom Moore," Watkins pretended to be the president of a corporation interested in investing in a tax shelter, specifically the mining industry, in the Montana area. On March 11, 1986, he met with Salusso and Steve and, wearing a body recorder, recorded their conversation. Following this meeting, Watkins next called Steve on April 7, 1986, to set up another meeting. Watkins met with Steve at 7:00 p.m., at Steve's residence in Butte, Montana. Initially, only Steve and Barbara Wogamon were present, but after about 10 minutes William Dee Morris arrived. Again, Watkins wore a body tape and recorded the conversation. Watkins returned to the Wogamon residence on April 9, 1986, to go over the books and records of the business. That same evening, Watkins met with Steve and Barbara Wogamon, William Dee Morris, and Wogamon at a supper club called Barclay's II in Anaconda to have dinner. Watkins next met with Barbara Wogamon on April 11, 1986, where he was provided a list of the stockholders in the corporation. The last meeting Watkins had was on May 16, 1986, with Wogamon at the Western Horizon Club located at the airport in Salt Lake City, Utah. At this meeting, Watkins received certain documents, such as tax returns and a depreciation list, relating to the corporation. Again, the conversation was recorded by Watkins.

Kreisimir Ivancic testified that he rented his home located at 2090 Calistoga Road in Santa Rosa, California, to appellant in June, 1983, for four and one-half months at the rate of $650.00 per month. Appellant used the name "Bob Fletcher" when he rented the house. Appellant again rented the home in February, 1984, through the summer, but this time at the rate of $1,250 per month. During the month of March, 1984, the usage of electricity increased from 600-650 kilowatts to 3500 kilowatts, and to 2900 kilowatts during the month of June, 1984.

Wogamon testified that he met Danny Jones in Los Angeles, California, in the early 1970's. He first learned to manufacture methamphetamine in 1973-74. He began manufacturing small quantities (3-5 pounds) and selling it through an individual by the name of Jack Biggs. He stated that in 1983, he had his stepson, Tim, and Ben Sautter deliver two pounds of methamphetamine to Jones and an individual by the name of Ronny Bayhoff in Las Vegas, Nevada. Then, in the latter part of 1983, or the early part of 1984, he stated that he again met Jones in Las Vegas, Nevada, and Jones "fronted" him one or two pounds of methamphetamine to help him out. Wogamon would then sell the methamphetamine to his stepson, Tim, and Doug Medici. Wogamon stated that Jones introduced him to appellant in 1984 at the Airport Hilton in San Francisco, California. Wogamon stated that his source of methamphetamine during the year 1984 for distribution to Tim and Medici was Jones and appellant. When Medallion Minerals Incorporated was formed, Wogamon approached Jones and appellant about putting some money into the business. They eventually agreed to invest up to one million eight hundred thousand dollars in the business. Initially, Jones and appellant were to put up one hundred thousand dollars, and if Wogamon obtained contracts on the mill and various properties, the additional funds, up to one million eight hundred thousand, would be furnished. Wogamon received the first hundred thousand dollars in September, 1984, at the Airport Hilton, in San Francisco, California. About one month later, in October, 1984, Wogamon received another two hundred thousand dollars from Jones and appellant. Wogamon stated

that he brought back approximately $400,000, and Tim brought back $80,000, from Jones and appellant for the corporation. However, as of March, 1985, Wogamon stated that Jones and appellant had given him $800,000 in cash to place in the corporation. The money would be given to Steve and ultimately deposited in different banks in increments of less than $10,000 to avoid the currency reporting requirements.

In February or March, 1985, Wogamon stated that he travelled to Santa Rosa, California, to help appellant manufacture a small amount of methamphetamine to make up for a bad batch that had been manufactured earlier. The location of the laboratory was the residence located at 2090 Calistoga Road in Santa Rosa, California. Wogamon manufactured as much as 100 pounds of methamphetamine at that location on three or four occasions.

Wogamon testified that in 1985, he and appellant invested in a mining venture belonging to William Nowlin, Gene Browning, and others, called the Shadow Mountain Systems. A total of one million dollars, made in four payments of $250,000 each, was ultimately given to Browning and Nowlin by appellant. Browning and Nowlin knew that the money was proceeds from the sale of methamphetamine.

In January, 1986, Wogamon and appellant manufactured approximately 50 pounds of methamphetamine at Lake Elsinore. Wogamon was arrested on May 26, 1987, and has remained in custody ever since having been sentenced to thirty (30) years on August 11, 1989.

Elizabeth Wogamon testified that she first met appellant in the summer of 1984, in Coos Bay, Oregon, when appellant purchased a Lakeside piece of property from her and Wogamon. Wogamon told her that appellant supplied him with methamphetamine. She stated that in the Spring or early Summer of 1985, she and Wogamon drove to Santa Rosa, California, and manufactured methamphetamine at the residence located at 2090 Calistoga Road with appellant. She was back at the residence in Santa Rosa during the latter part of the summer or early fall, when Wogamon told her that appellant had been arrested. The next day, she met Wogamon and appellant in the parking lot of a supermarket in Santa Rosa

where Wogamon gave her a duffel bag containing $250,000 and told her to drive it to Las Vegas, Nevada. Once in Las Vegas, Nowlin and Browning picked up the money. She further testified that in the fall of 1985, she accompanied Wogamon to the Shadow Mountain mine site. There, appellant and Nowlin were present when methamphetamine was manufactured. And, she testified that in April or May, 1986, she was present in Lake Elsinoe, California, when 50 pounds of methamphetamine were manufactured by Wogamon and appellant. She said that Ben Sautter picked her up and drove her and her daughter back to Butte, Montana. Prior to returning to Montana, Wogamon had placed a box in the vehicle containing 25 pounds of methamphetamine. When they arrived, Ben Sautter dropped her and her daughter at their residence, and took the methamphetamine to Townsend, where it was later taken to California by Wogamon. Elizabeth Wogamon was arrested with her husband in May, 1987, entered a plea of guilty to three tax charges in June, 1989, and was sentenced to 11 years imprisonment.

Gene Browning[13] testified that on July 14, 1985, he met appellant and a female companion at the Oakland International Airport and was given $250,000 to invest in Shadow Mountain Systems, Inc. This was the first of four payments of $250,000, or a total of one million dollars, that Wogamon had agreed to invest into the business. Browning was involved in another receipt of $250,000 in Las Vegas, Nevada.

On June 28, 1991, a pretrial hearing was held on appellant's motion to suppress certain evidence seized from him on September 19, 1985.[14] This evidence consisted of a film canister seized from his front pants pocket that contained a small amount of methamphetamine, and 25 pounds of methamphetamine, a handgun, and $2,020 in cash that was seized from his vehicle. At the conclusion of this hearing, counsel

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[13] Browning was a codefendant in the present case, but entered into a plea of agreement with the government and testified at the trial.

[14] Appellant had arrived at the residence of Keith Nowlin, located at 169 Wellington, in Concord, California, during the execution of a search warrant by state agents.

for appellant requested, and the court granted, a continuance to secure the testimony of additional witnesses.

Following jury selection on July 8, 1991, counsel for appellant reminded the court that the suppression motion was still pending, and requested the court to instruct the prosecutor not to mention the searches in his opening statement until such time that the legality of the searches was determined. The prosecutor responded as follows:

> MR. SEYKORA: Let me advise the Court of something then, because I'm sure that my opening statement, I anticipate talking about Mr. Wells' arrest in September of 1985. However, not of the seizure. *That information will be testified to by Don Wogamon.* And that Mr. Wells didn't show up when they were cooking crank. Mr. Wells and Mr. Wogamon just cooked that batch of crank that was seized. I was not going to mention the seizure. But I'm going to mention in the opening statement that Mr. Wogamon in fact learned that Mr. Wells was arrested, and because of that, several things happened in this particular case which are overt acts in the conspiracy, including the moving of money, including the shutting down of the lab location, including moving the lab to Shadow Mountain Systems.
>
> I'm not going to mention the seizure of the money or the seizure of the dope which is still under issue of suppression, but I'm going to mention those statements of Mr. Wogamon, Your Honor. (Emphasis added).

Then two days later, on July 10, 1991, just prior to the beginning of the trial, counsel for appellant advised the court that he had just received information that would have substantial bearing on the legality of the search of appellant on September 19, 1985, and again requested the court to admonish the prosecutor not to allude to the arrest, search, or seizure that occurred on September 19, 1985, in his opening statement. The following then occurred:

> MR. SEYKORA: Thank you, Your Honor. As I indicated to the Court on Monday afternoon, Government is well aware that the Court still has under

consideration the Motion to Suppress certain evidence. But I believe I stated it to the Court on Monday, and unless it's not clear, I intend to use that in an opening statement in this context: That Don Wogamon and Mr. Wells had cooked approximately 25 pounds of meth in Santa Rosa, California. Mr. Wogamon was in the lab area, Mr. Wells left for a considerable amount of time and did not come back. Later Mr. Wogamon learned, through talking with Mr. Wells, that he had been detained by the police.

As a result of that, Mr. Wogamon packed up the Santa Rosa lab, moved the lab down to Shadow Mountain Systems, Elizabeth Wogamon grabbed $250,000 in cash, moved it down to Las Vegas and gave it to Mr. Browning and Mr. Nowlin.

I'm not going to dwell upon the fact that there was 25 pounds of meth taken from Mr. Wells. That's the outline which I wish to present it, and that's based upon co-conspirator statements of Mr. Wogamon not upon issues still pending before this Court and not yet litigated, Your Honor.

THE COURT: Mr. Abraham, what do you have to say about that? I think you're correct up to a point. I think insofar as the matters pending relating to the suppression motion, I don't want any of you to talk about those things until the Court fully hears that motion and decides it. I do not see how the arrest and detention fit into that category.

MR. ABRAHAM: Your Honor, I think it perhaps is the fruit of the search, the illegal arrest. Mr. Wells could very well be the fruit of the illegal search, and furthermore, the contention on the part of Defendant, Your Honor, is that there was an illegal arrest with regards to Mr. Wells on that date. And therefore, I think that the arrest, the search, and the seizure should be decided with regards to the law of the case and further information that I plan on getting to, Your Honor.

THE COURT: And I think I understand your position now, and I agree with you up to the arrest. I do not agree with you as to the arrest.

> Whether or not it was legal, it did occur, and it did trigger certain other things which I think that the United States is entitled to go into here.
>
> So your motion is denied. Thank you.

During his opening statement, the prosecutor told the jury that:

> "In September, 1985, once again, Don Wogamon, Mr. Wells were still cooking crank. They cooked up a batch in the Santa Rosa lab at the home of Mr. Kasmaric. Mr. Wells left; didn't come back. Don Wogamon got concerned. Found out later that Mr. Wells had been detained by the police. Because of that, because of that, the lab in Santa Rosa was shut down; it was packed up; it was moved out of there."

On July 16, 1991, the court resumed the hearing on appellant's motion to suppress evidence seized on September 19, 1985. Following said hearing, the court expressed his doubts as to the validity of the search and seizure of evidence on that date:

> THE COURT: I think they were all right until they opened the film canister. I think that was their undoing if anything was.

The court did not rule on the motion, but took the matter under advisement. However, on the following day, July 17, 1991, the court made the following statement:

> THE COURT: I think that they were entitled to search him, as I told you.
>
> MR. ABRAHAM: Yes, sir.
>
> THE COURT: And I think they were entitled to remove this bulge from his pocket, ascertain that it was not a weapon. What I don't think they were entitled to do was to open the canister. And I think that's where the mischief occurred, *and I think that's what makes the search illegal. And if I get a minute to write an order, that's what I intend to hold. I think the '85 search was illegal.*

The following day, July 18, 1991, Donald Wogamon took the stand to testify. Despite the unequivocal statements by the trial court holding the search to be illegal, and despite the

prosecutor's knowledge that Wogamon was, in fact, going to testify concerning the illegal arrest and seizure,[15] it was established that the prosecutor *never* advised Wogamon not to mention, or bring before the jury, this inadmissible evidence. During the prosecutor's direct examination of Don Wogamon, the following occurred:

> Q Okay. When is the last time in May or June of '85 that you cooked a batch, if you recall there at Chris' place?
>
> A The last time we cooked at Chris' place would be the same time that Bobby got arrested for that 25 pounds.
>
> MR. ABRAHAM: Your Honor, may it please the Court, may we have a side bar, please.
>
> THE COURT: Yes.

Then, outside the presence of the jury, the following occurred:

> MR. ABRAHAM: Your Honor, now comes Mr. Wells and makes his motion for a mistrial in this case for the reason that the question was asked of – the question was asked of this witness, Mr. Wogamon, and he relayed to the members of the jury that Mr. Wells had been arrested for 25 pounds of methamphetamine.
>
> And I would now like to move for a mistrial based upon that factor, because this Court has suppressed that evidence and I would ask now for the mistrial.
>
> MR. CHESNOFF: I would join in that, Your Honor. And in the alternative, seek a severance.
>
> MR. SHEEHY: And I would likewise join, Your Honor; in the alternative, seek a severance.

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[15] See Seykora's statement, mentioned above where he stated:

MR. SEYKORA: Let me advise the Court of something then, because I'm sure that my opening statement, I anticipate talking about Mr. Wells' arrest in September of 1985. However, not of the seizure. *That information will be testified to by Don Wogamon.*

MR. HOOVESTAL: Same motion.

MR. CHESNOFF: I would also add that I think it's misconduct that a Government witness when the Government has had years to prepare and the Government knows the Court suppressed and we waited and waited until we got a ruling so that the trial would proceed knowing whether or not that was going to come in, to then allow a Government witness that they have a constant contact with and can prepare to blurt out that answer is misconduct. And that's why it should be dismissed.

MR. ABRAHAM: I adopt that, Your Honor.

MR. SEYKORA: First of all, I wasn't attempting to elicit that response. I was talking about May or June. Needless to say, we would still understand that the Court has suppressed the physical evidence of the dope. That does not go hand-in-hand with Mr. Wogamon's ability to talk about his co-conspirator testimony that Mr. Wells told him that he was arrested for a batch which they just cooked. We do not have the physical property to put before the jury, but he can still discuss and talk about co-conspirator statements with Mr. Wells.

MR. CHESNOFF: He –

THE COURT: I agree with that. The Court can't change the witness's testimony.

MR. CHESNOFF: And Your Honor –

THE COURT: I do intend to enter an order suppressing the search that resulted in the 25 pounds of methamphetamine being taken from his car. But as I told you before, I don't see how the Court can change facts.

And therefore, the motions each and all are denied.

The court then instructed the jury that

"there has been testimony here given by this particular witness relating to an arrest of one of the Defendants. And also a statement concerning certain methamphetamine. For reasons that the Court

need not discuss at this point with you ladies and gentlemen of the jury, you are instructed to disregard any portion of the witness's statement that related to the methamphetamine.

"And secondly, I want to caution you folks that this particular evidence was adduced relating only to one Defendant, and as you listen to the evidence, remember that the evidence is related only to that one particular Defendant and is not applicable to the other Defendants unless it is so stated or unless it is pursuant to a conspiracy which you folks have already determined is in existence and is being pursued."[16]

Only moments later, the following occurred:

Q And did you finish the batch?

A Yes. I finished the batch up. And that – a man named Ronny and Bob, and subsequently during the time he took down some crank to be sold, and he got arrested at this guy's house.

MR. ABRAHAM: Your Honor, if it please the Court, I renew my objection and motion for mistrial.

MR. CHESNOFF: Your Honor, for the record, I have to join and say that the motion is now amplified. I'd ask for the same instructions, too, Your Honor. And I'd ask that perhaps Mr. Seykora reconsider his questioning.

THE COURT: All right. The marshall will take the jury out please. All rise.

Then, outside the presence of the jury, the following occurred:

THE COURT: Be seated, please. I'd like the court reporter to read back the question and the answer so that I can see what it was, please.

The questions and answers were read back.

THE COURT: All right. Now, I understand this is a completely separate transaction. Maybe it isn't.

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[16] It appears that the court was telling the jury not to consider the evidence, but if they do, only consider it against appellant.

Mr. Abraham, you may –

MR. ABRAHAM: No, Your Honor.

THE COURT: – make your motion and explain it to me, please.

MR. ABRAHAM: Yes, sir. Apparently, this witness is telling them about the same transaction that he stated to the ladies and gentlemen of the jury earlier.

In other words, this is the second time he has repeated that same statement that my client, Mr. Wells, has been arrested in connection with a transaction that involved methamphetamine. And that's the basis of my objection and the basis of my motion for mistrial.

The Court had told Mr. Seykora yesterday afternoon that the Court had suppressed that evidence. And the first time that Mr. Wogamon had made the statement to the ladies and gentlemen of the jury, Mr. Seykora had indicated that it was a blurted-out type of an answer. And now it was a question that prompted that answer.

And I suggest to the Court that it doesn't matter whether or not this witness blurted it out or not, the admonishments should have been given to this witness by Mr. Seykora prior to the time that he took the stand in connection with this case that he should not have alluded to that factual situation regarding Mr. Wells, his arrest, and the seizure of 25 pounds of methamphetamine.

I suggest to the Court, Your Honor, and ask the Court for a mistrial in this case, because any instruction that this Court gives the ladies and gentlemen of this jury can never ever cure the problem that Mr. Wells will have with this jury and their later deliberations as to the guilt or innocence of my client. And I ask for a mistrial.

THE COURT: And this relates directly to the same transaction?

MR. ABRAHAM: Same transaction.

THE COURT: That is, the 25-pound case and the same arrest; is that correct?

MR. ABRAHAM: Yes, sir. Yes, sir.

THE COURT: And Mr. Seykora, is that your understanding of the facts here?

MR. SEYKORA: The question I asked, I believe, was whether or not the batch was finished. And this came out as a response as I hear the court reporter. I was not aware of anyone else being arrested other than Mr. Wells. I was not attempting to elicit that response.

It's my understanding, the Court's previous ruling at the side bar was that we cannot avoid the facts in this case. I was trying to set up the time frame which he moved to Las Vegas. If the Court's total ruling is that Mr. Wogamon cannot discuss co-conspirator statements that he had with Mr. Wells and the reason why the laboratory was shut down and moved to Vegas in a hurried fashion then we will comport with that.

I do not believe that that's the ruling of the Court at this time.

THE COURT: All right. Let me – Thank you. Let me sort this out then. First of all –

MR. CHESNOFF: Your Honor, may I interrupt you? May I voir dire the witness for one moment, please, for the record?

THE COURT: Not just yet.

First of all, with respect to the search of Defendant Wells' automobile in 1985 in California, I have intended to but haven't had time to get a written order entered suppressing that evidence. And I will do so this afternoon.

But the Court suppresses any evidence relating to that particular transaction. That is includes the search of Mr. Wells, the removal from his pocket of the canister which was properly removed but which was illegally opened. And that was an illegal search and the remainder of that transaction, then, is poisoned by the illegality of that particular unauthorized and unconstitutional search. So that information is suppressed as of this moment.

Now, backing up a step to the prior objection, I understand that the witness testified with respect to

the arrest of Mr. Wells. I did not prevent that, because that is an event which occurred and it fixes a time frame that the Government and the witness are trying to put together here. I think that's appropriate.

I did give a limiting instruction to the jury, and I think that that problem is cured.

With respect to what has just occurred, I think your objection should be one not for a mistrial but one to strike the answer which is nonresponsive. And that's what I intend to do. The answer was not responsive to the question. I intend to strike the answer and instruct the jury to disregard it.

And so your motions each and all are denied and your objections are overruled.

Now, Mr. Abraham, do you want to be heard further on that? Is there further evidence that you want to get into the record here?

MR. ABRAHAM: Your Honor, the only evidence that I want into the record is that I want to stand with regards to the objection that I made and the motion that I made for mistrial. I disagree, most respectfully, with Your Honor with regards to any instructions that the Court plans on giving to the ladies and gentlemen of the jury for the reason that any instructions that the Court now gives to these people who are members of the jury will never cure, so far as my client is concerned, any harm that's been done to him.

And during their deliberations, although Your Honor has told them to disregard it, I do not think will cure the defect nor will it cure any harm that's been done to my client. And I object to it, and again for the purposes of the record, want to make it perfectly clear that I've moved for a mistrial and not that I've moved to strike the answer.

THE COURT: There is no doubt that you have moved for a mistrial.

MR. ABRAHAM: Yes, Your Honor.

THE COURT: And equally free of doubt should be the fact that it is denied. Now, Mr. Chesnoff.

MR. CHESNOFF: Yes.

THE COURT: I'm not going to have you interrogate the witness. But if you want to make a further record –

MR. CHESNOFF: Thank you, Your Honor.

THE COURT: – beyond what has been done, you may proceed.

MR. CHESNOFF: As an offer of proof, Your Honor, I would have inquired of the witness as to whether or not Mr. Seykora or any of the Government agents told the witness prior to his testimony this morning that in fact the Court had indicated last evening it was the Court's intention to suppress the fruits of the illegal search. And I would make as an offer of proof the response from the witness would be that he was never advised.[17]

So the reason I do that, Your Honor, is so that the record is perfected that the Government proceeded with the questioning without warning a witness that evidence that this Court has found violated the Fourth Amendment was not going to come into the trial.

I would renew my request to ask Mr. Wogamon those questions so that there is a perfected record.

In addition, Your Honor, I would most respectfully state to the Court that but for the illegal search and arrest of Mr. Wells, Mr. Wells never would have made the alleged comment to Mr. Wogamon; and therefore, under the Wong Sun[18] analysis, it is the fruit of the poisonous tree because the conversation is a direct result of the police illegality. It is not attenuated in any way. It is a direct result of it. And I would reiterate on behalf of Mr. Jones that it is misconduct to allow a witness to go unprepared on a

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[17] In fact, it was later established that the witness was never told not to mention the fact of the illegal arrest, search, and seizure that occurred on September 19, 1985.

[18] *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

witness stand, unaware of Court rulings affecting illegally-seized evidence.

I don't think that a curative instruction, most respectfully, does the job. The whole purpose of the suppression is so that the jury is not tainted by the illegally-seized evidence. And if the exclusionary rule is going to have any deterrent effect on the police then it shouldn't come into the trial.

So we would renew our objections, and I would, Your Honor, just like to ask Mr. Wogamon whether or not he was ever warned. Or unless the Government wants to stipulate that they didn't, Your Honor.

THE COURT: Mr. Seykora.

MR. SEYKORA: Your Honor, I guess the Government is somewhat confused as to what we can and cannot ask the witness. The Government's position is, and still is, unless I've heard to the contrary, that this gentleman is testifying as to facts that were given to him by Mr. Wells whether or not a laboratory blew up, whether or not he was arrested for whatever reason. He's entitled to state the facts as to why they shut down the lab; why they moved the laboratory at that time to the Shadow Mountain Systems. I think the jury's entitled to this.

The Fourth Amendment violation that this Court has ruled upon is the actual seizure and use of those substances that were seized by the Concord Police Department. Mr. Wogamon is totally entitled – the conspiracy continued – to testify why the conspiracy continued, why the lab was moved. I don't see there's any violation whatsoever, Your Honor. Whether the information is rightfully or wrongfully imparted to Mr. Wogamon by his co-conspirator, it's valid admissible evidence to show and prove why they furthered the conspiracy; why they moved it to another location and continued making payments in million dollars in cash, Judge.

And if I've misread the Court, I apologize, and if there's some instruction to Mr. Wogamon to do that. But his testimony has nothing to do with the Concord seizure. He's testifying to what he knew,

what he was told by his co-conspirator, and why they moved the lab, and we seek to go into that information.

THE COURT: And I agree with that. And we can hardly have the witness at this point say, well, he wasn't really arrested, he went on vacation, if that didn't occur. If he was arrested or if he told this witness that he was arrested, the witness can't do much except tell this story.

Now, if you want to move and provide the Court with authority that will allow the Court to instruct the witness in limine, I'll be glad to consider that evidence. But at this point, your objections and your motions are denied.

Prior to Elizabeth Wogamon testifying, counsel for appellant requested that the court not allow her to mention the fact that appellant had been arrested and methamphetamine seized on September 19, 1985 because said arrest and seizure were made in violation of the Fourth Amendment to the United States Constitution. The court denied the request. Thereafter, the jury was again informed by Elizabeth Wogamon that "my husband told me that Mr. Wells had been arrested."

On February 23, 1990, Petitioner[19] was charged by grand jury indictment issued out of the United States District Court for the District of Montana, Butte Division, for distributing, or aiding or abetting, the distribution of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

On September 21, 1990, Petitioner was named in six counts of a seven-count indictment issued by the grand jury for the United States District Court for the District of Montana, Helena Division,

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[19] Named with Petitioner as a codefendant in this indictment was Daniel Aloysius Jones.

charging him[20] in Count I with conspiring to defraud the United States by impeding the collection of taxes in violation of Title 18 United States Code, Section 371 and 2; Count II charged that Petitioner[21] aided and assisted in the preparation and presentation to the Internal Revenue Service of a false and fraudulent corporation income tax return for the year 1984, in violation of Title 26, United States Code, Section 7206(2); Count III charged that Petitioner [22] aided and assisted in the preparation and presentation to the Internal Revenue Service of a false and fraudulent corporation income tax return for the year 1985, in violation of Title 26, United States Code, Section 7206(2); Count IV charged that Petitioner[23] conspired to manufacture or distribute methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 846, and Title 18, United States Code, Section 2; Count V charged that Petitioner[24] conspired to receive income derived from a violation of Title 21, United States Code, Section 841(a)(1) and 846, and used or invested said income in the acquisition of an enterprise that engaged in activities that affected interstate or foreign commerce, in violation of Title 21, United States Code, Section 854 and 855 and Title 18, United States Code, Section 2; Count VI charged that Petitioner[25] received income derived from a violation of Title 21, United States Code, Section 841(a)(1) and 846, and used or invested said income in the acquisition of an enterprise that engaged in activities that affected interstate or foreign commerce, in violation of Title 21, United States Code, Section 854 and 855 and Title 18, United States Code, Section 2; and, Count VII charged Gene Budge Browning with

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[20] Named as coconspirators in this count were Daniel Aloysius Jones, Gene Budge Browning, William Dee Morris, and William Mitchel Nowlin.

[21] Daniel Oloysius Jones was named as a codefendant in this count.

[22] Daniel Aloysius Jones was named as a codefendant in this count.

[23] Named as coconspirators in this count were Daniel Aloysius Jones, Gene Budge Browning, William Dee Morris, and William Mitchel Nowlin.

[24] Named as coconspirators in this count were Daniel Aloysious Jones, Gene Budge Browning, William Dee Morris, and William Mitchel Nowlin.

[25] Named as codefendants in this count were Gene Budge Browning, William Dee Morris, and William Mitchel Nowlin.

perjury before the grand jury in violation of Title 18, United States Code, Section 1623.[26]

On July 8, 1991, the two indictments were consolidated for trial in the United States District Court for the District of Montana, Helena Division, and a jury was selected. Trial commenced on July 10, 1991.

On August 5, 1991, the jury found Petitioner guilty as to the charge contained in the Butte indictment, and guilty as to Counts I, IV, V, and VI contained in the Helena indictment. Petitioner was found not guilty as to counts II and III contained in the Helena indictment.

On December 9, 1991, the district court sentenced Petitioner as follows: with respect to the Helena indictment, ten (10) years of imprisonment as to Count V and ten (10) years of imprisonment as to Count VI, Counts V and VI to be served concurrently; five (5) years of imprisonment as to Count I and thirty (30) years of imprisonment as to Count IV, Counts I and IV to be served consecutively to each other and consecutively to the sentence imposed on Counts V and VI, for a total term of imprisonment of forty-five (45) years. In addition, the court imposed a term of two (2) years of supervised release as to Counts I, IV, and V, and six (6) years of supervised release as to Count VI. With respect to the Butte indictment, the court sentenced appellant to thirty (30) years of imprisonment, to be served concurrently with the sentence imposed in the Helena indictment, and six (6) years of special parole. The terms of supervised release and special parole also ran concurrently.

On appeal, Petitioner argued that the district court erred in allowing the introduction of testimony concerning his prior arrest and seizure of 25 pounds of methamphetamine because said arrest and seizure were in violation of the Fourth Amendment

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[26] This count was "disposed of" prior to trial because Browning pleaded guilty and testified as a witness for the government.

to the United States Constitution.[27] Petitioner further argued that the prejudicial effect of said testimony greatly outweighed its probative value in violation of Rule 403 of the Federal Rules of Evidence.

The Ninth Circuit disagreed, holding that "any error caused by the jury's exposure to the testimony was harmless beyond a reasonable doubt." (Slip op. at p. 16). The Court found it unnecessary to decide whether a Rule 403 violation occurred.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Arizona v. Fulminante,* 499 U.S. ___, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991) (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). That is, "the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman, supra.* "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt,* ___ U.S. ___, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991). "The Court has the power to review the record *de novo* in order to determine an error's harmlessness." *Arizona v. Fulminante, supra.*

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[27] The district court did in fact suppress evidence of the methamphetamine found in the film cannister removed from Petitioner's pocket, and the 25 pounds of methamphetamine subsequently seized from his vehicle.

> In the present case, the Ninth Circuit stated:
>
> "[W]e find that any error caused by the jury's exposure to the testimony was harmless beyond a reasonable doubt. The other evidence of Wells' involvement in the charged offenses was overwhelming, and there is no reason to believe this part of Wogamon's testimony was particularly compelling or contributed to Wells' conviction."

Slip op. at 16. Petitioner submits that the Court's opinion fails to appreciate the significance of the fact that the jury returned not guilty verdicts on several of the counts, and were unable to reach unanimous verdicts on several of the other counts. Specifically, the jury acquitted codefendant Jones on Counts I, II, and III of the Helena indictment, and could not reach a unanimous verdict on either Counts IV and V of the Helena indictment and the Butte indictment. The Butte indictment charged appellant and Jones with distributing methamphetamine. Count IV of the Helena indictment charged that appellant conspired with Jones and others to manufacture or distribute methamphetamine. The government's star witness, Don Wogamon, testified extensively regarding the activities of *both* Jones and appellant with respect to methamphetamine dealings throughout the periods alleged in the indictments. And yet, the jury *could not* reach a verdict on Jones with respect to the Butte indictment or Count IV of the Helena indictment (alleging distribution, and conspiracy to distribute methamphetamine). The same jury did in fact reach unanimous verdicts on these counts with respect to appellant. Although it is impossible to determine why the jury reached unanimous verdicts with respect to appellant, and could not reach a verdict with respect to Jones, when Wogamon testified *equally damaging* as to both individuals, appellant submits that this Court cannot state *beyond a reasonable doubt* that the testimony of Wogamon concerning appellant's prior arrest and seizure of 25 pounds of methamphetamine *did not* contribute to the verdict obtained. At the very least, evidence that appellant was arrested in possession of 25 pounds of methamphetamine certainly tended to corroborate Don Wogamon's

testimony and give it some credibility. As the Seventh Circuit stated in a case involving an analogous situation:

> "The evidence of petitioner's guilt was impressive but not overwhelming. In a trial that lasted more than two weeks and involved approximately thirty-three witnesses, only two witnesses, Lewis and Pointer, implicated the petitioner in the robbery. Lewis and Pointer, admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses. The strength of their sometimes conflicting testimony does not approach the level required to render this constitutional error harmless."

Dudley v. Duckworth, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied,* 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989). (citation omitted). The evidence of appellant's guilt in the present case was impressive but not overwhelming, and came *solely* from inherently incredible witnesses, admitted accomplices testifying in exchange for immunity, dismissal of charges, and reduced sentences.

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH ANOTHER DECISION OF THAT COURT ON THE SAME MATTER.

Petitioner objected to the introduction of evidence concerning his arrest and the seizure of 25 pounds of methamphetamine on September 19, 1985, on the grounds that said arrest and seizure were in violation of the Fourth Amendment to the United States Constitution. The prosecutor argued that it was necessary to admit this evidence to establish a time frame as to when the laboratory in Santa Rosa, California, was shut down and the laboratory in Shadow Mountain Systems was opened. Although the court had already ruled that the seizure of the methamphetamine was illegal, the court agreed with the prosecutor, stating that

> " . . . with respect to the arrest of Mr. Wells. I did not prevent that, because that is an event which

> occurred and it fixes a time frame that the Government and the witness are trying to put together here. I think that's appropriate."

Thus, the court determined that the probative value of Don Wogamon telling the jury that the laboratory was moved from Santa Rosa, California, to Shadow Mountain Systems after Petitioner had been arrested with 25 pounds of methamphetamine in September, 1985, outweighed its prejudicial effect on the jury, and the evidence was admitted solely for that purpose.

In a recent opinion, the Ninth Circuit had occasion to discuss a similar fact situation. In *United States v. Hill*, 953 F.2d 452 (9th Cir. 1991), defendant was convicted of conspiracy and attempt to possess with intent to distribute cocaine. At trial, one of the coconspirators, Mulhern, testifying for the government on direct examination pursuant to a plea bargain agreement, stated that five years prior, she and defendant had occasionally used cocaine together. Over defense objection, the government argued that the evidence was "direct evidence concerning the circumstances which led up to the transaction involved." *Id.* at 455.

> "The government explained, and the trial court agreed, that the evidence was direct evidence establishing the circumstances and background under which it became logical and proper for Mulhern to contact Hill in an attempt to obtain money for the cocaine deal. The jury was later instructed that they should consider this evidence for the sole purpose of describing the relationship between Hill and Mulhern."

Id. The court instructed the jury that they should consider this evidence for the sole purpose of describing the relationship between Hill and Mulhern. On appeal, the Ninth Circuit reversed holding that it was error for the district court to admit the testimony. Although the Court recognized that the government's argument was not completely devoid of merit, the Court stated:

> "Under Rule 403, evidence may be excluded if its prejudicial effect outweighs its probative value or would tend to mislead the jury. The danger that the

> jury would view Mulhern's testimony as evidence indicating that Hill was more likely to participate in a drug transaction far outweighed its arguable utility in providing a logical connection between Mulhern and Hill. *Alfonso*, 759 F.2d at 738-40. In addition, the limiting instruction given by the district court did not direct the jury to consider the evidence only for motive, but only served to underscore the prejudicial aspect of the testimony."

Id. at 457-58.

Just as in *Hill*, in the present case there can be little doubt that the true use of the testimony was not only to prove a character trait of Petitioner, but also to add credibility to Don Wogamon's testimony. And, just as in *Hill*, the probative value was greatly outweighed by its prejudicial effect and certainly tended to mislead the jury. The reasoning in the *Hill* case and the present case are virtually indistinguishable.

CONCLUSION

For the foregoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM MITCHELL NOWLIN, DANIEL ALOYSIUS JONES, WILLIAM DEE MORRIS, and ROBERT WELLS, Defendants-Appellants.	Nos. 91-30429 91-30446 91-30460 91-30468 D.C. Nos. CR-90-20-H-CCL CR-90-5-BU-CCL MEMORANDUM* (Filed Mar. 1, 1993)

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted January 6, 1993
Seattle, Washington

Before: WRIGHT, FARRIS and KLEINFELD, Circuit Judges.

Codefendants Daniel Jones and William Nowlin appeal the district court's denial of their motion to dismiss on grounds of double jeopardy and collateral estoppel. Codefendants William Morris and Robert Wells appeal their jury trial convictions for conspiracy to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit rule 36-3.

defraud the United States in violation of 18 U.S.C. § 371, conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846, conspiracy to invest illegal drug profits into a business in violation of 21 U.S.C. §§ 854 and 846, and investment of proceeds from drug transactions into a business in violation of 21 U.S.C. §§ 854 and 855. We affirm.

I. Facts.

On February 23, 1990, codefendants Daniel Jones and Robert Wells were indicted on one count of distributing methamphetamine in violation of 21 U.S.C. § 841(a) ("Butte indictment"). Subsequently, on September 21, 1990, the government filed a six count indictment against Jones and Wells, as well as three others, William Morris, William Nowlin, and Gene Browning ("Helena indictment"). All five defendants were charged in four of the counts:

> Count I: conspiracy to defraud the United States in violation of 18 U.S.C. § 371.
>
> Count IV: conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846.
>
> Count V: conspiracy to invest illegal drug profits into a business in violation of 21 U.S.C. §§ 854 and 846.
>
> Count VI: investment of proceeds from drug transactions into a business in violation of 21 U.S.C. §§ 854 and 855.

Wells and Jones were charged in Counts II and III with filing false corporate tax returns in violation of 21 U.S.C.

§ 7206(2). Gene Browning accepted a plea agreement with the government and the others proceeded to trial.

The government previously had obtained guilty pleas pursuant to plea agreements from Don Wogamon and three members of his family. Wogamon was a key figure in the drug manufacturing and money laundering conspiracies. When he was first indicted in May of 1987, William Morris served as counsel for him and his wife. Once the government was able to debrief Wogamon, they obtained evidence to support charges against the five defendants named in the Helena indictment. Wogamon was one of the government's key witnesses at trial. Browning also testified pursuant to his plea agreement.

Wogamon testified that he began manufacturing and distributing methamphetamine with Daniel Jones in 1983. The following year, Jones introduced Wogamon to Robert Wells. Wells gradually became more involved with Wogamon in the manufacturing process. Wogamon said that he and Wells "cooked" methamphetamine a number of times over the next couple of years.

In 1984, Wogamon formed a corporation called Medallion Minerals for the purpose of mining gold in the Butte, Montana area. Proceeds from drug sales were deposited in Medallion in order to make the income look legitimate. Wells and Jones agreed to invest $1.8 million in Medallion from their methamphetamine manufacturing business. They received stock from the corporation in exchange. During 1984 and 1985, Wogamon helped Wells and Jones with their manufacturing in Santa Rosa, California and flew back to Montana with money to deposit in Medallion accounts. All deposits were under $10,000 to

avoid having the banks file currency transaction reports. The cash was reflected as gold sales on Medallion's books.

Wells and Jones had a falling out in early 1985, and Jones decided not to finance Medallion further. Wogamon said he last saw Jones in February of 1985. In June 1985, William Morris, a longtime friend of Wogamon's, introduced him to Gene Browning, who was involved in the mining business. Browning had developed a device to extract gold from ore, and was trying to find interested investors. Wogamon and Wells agreed to put one million dollars into Browning's Nevada corporation. The money was delivered in four $250,000 cash payments.

Browning subsequently introduced Wogamon to William Nowlin. Nowlin was looking for investors to fund a mining venture. In July 1985, Wogamon and Wells agreed with Nowlin to provide one million dollars to fund a new company called Shadow Mountain Systems, Inc. In exchange, they received an interest in the corporation. The million dollars was paid in four $250,000 cash installments. Nowlin used the money to purchase equipment for Shadow Mountain. Wogamon testified he informed Nowlin that the money came from the proceeds of drug sales.

In September 1985, Wells and Wogamon manufactured a fifty pound batch of methamphetamine at the Santa Rose laboratory. After completing the batch, Wells was arrested with twenty-five pounds in his car. Wells had entered Nowlin's house while state agents were executing a search warrant. An agent patted down Wells and felt a hard object in his pants pocket. The agent removed

a film cannister from Wells' pocket and opened it. It contained a small amount of methamphetamine. Since the agent improperly opened the cannister, the district court suppressed evidence of the methamphetamine found therein and the twenty-five pounds subsequently seized from Wells' car. Nevertheless, Wogamon testified at trial that Wells told him that he had been arrested with the twenty-five pounds. This testimony was presented by the government to explain the facts and circumstances concerning the moving of the drug lab from Santa Rosa to near Las Vegas.

The lab equipment was initially moved to trailers located on Shadow Mountain's property. Nowlin had keys to the trailers and allowed Wells and Wogamon to put the equipment there. Wells and Wogamon attempted to manufacture methamphetamine at the site, but their efforts were not very successful. Wogamon testifed that Nowlin occasionally came to the site and asked what was going on.

At one point, when there was $250,000 cash infusion into Medallion that needed to be covered, Morris agreed to put together a story and supporting documentation to show that the cash had come from the International Fuel Development Corporation, a foreign corporation. The cash was, in fact, proceeds from methamphetamine sales.

In March 1986, Medallion Minerals filed for bankruptcy, and Morris prepared the necessary filings. Morris filed a false bankruptcy Disclosure Statement with the bankruptcy court. In October 1986, a grand jury subpoena was issued requiring Medallion to produce its records and books. In an effort to buy time, Morris suggested that

he hold himself out as custodian of Medallion's records. This gave Wogamon and Morris time to alter corporate documents and create minutes of meetings that never occurred in an effort to throw off the grand jury.

During his efforts to "fix" the records, Morris caused 3.1 million shares of Medallion stock to be issued to himself in order to cover the $250,000 in drug sale proceeds that was supposed to have been received from the International Fuel Development Corporation. Wogamon also testified that he and Morris altered records to reflect gold production and sales that never occurred in order to cover drug money deposits.

Wogamon was indicted in May of 1987. Although Morris initially served as his attorney, he was eventually replaced and ultimately named in the subsequent indictment filed in September of 1990.

II. Appellants Nowlin & Jones.

A. Double Jeopardy.

We review a district court's denial of a motion to dismiss on double jeopardy grounds de novo. *United States v. Lun*, 944 F.2d 642, 644 (9th Cir. 1991). "As a general principle, retrials following hung juries do not cause double jeopardy because the failure of the jury to reach a verdict means that jeopardy has not yet terminated." *United States v. Seley*, 957 F.2d 717, 719-20 (9th Cir. 1992) (citation omitted). The "same conduct" test promulgated by the Supreme Court in *Grady v. Corbin*, 495 U.S. 508 (1990), does not apply to a retrial following a hung jury because it does not constitute a successive

prosecution. *Seley*, 957 F.2d at 720. Since this is not a successive prosecution, double jeopardy does not bar retrial except to the extent it is implicated in the collateral estoppel analysis.

B. Collateral Estoppel.[1]

The applicability of collateral estoppel is reviewed de novo.[2] *Id.* To determine whether collateral estoppel bars reprosecution of a particular charge, we must

> examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

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[1] Appellants Jones and Nowlin argue that there was an "implied acquittal" on the hung jury counts. The counts at issue are separate and distinct offenses. None were lesser included offenses, so there could have been no implied acquittal. *See e.g., Green v. United States*, 355 U.S. 184 (1957) (holding that a conviction of second degree murder barred reprosecution of first degree murder charge after the conviction was reversed on appeal).

[2] The district court held that collateral estoppel did not apply because the retrial is a continuation of first proceeding, and therefore issues could not be foreclosed by the acquittals. While this reasoning is appropriate for determining whether to apply the *Grady* "same conduct" test, it was implicitly rejected by this court's collateral estoppel analysis in *Seley*, 957 F.2d 717.

Id. at 721 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)); *see also United States v. Bailin*, 977 F.2d 270, 275-80 (7th Cir. 1992) (discussing relationship between double jeopardy and collateral estoppel). Thus, we must determine which ultimate facts the jury decided in acquitting each defendant.

1. Appellant Jones.

Appellant Jones was found not guilty on Counts I, II & III of the Helena indictment. He faces retrial on Counts IV, V of the Helena indictment and the single count from the Butte indictment. All of the jury's not guilty verdicts were for offenses that involved defrauding the Internal Revenue Service (IRS). The jury rationally could have found Jones not guilty on the ground that he wasn't involved in a scheme to defraud the IRS. Since such involvement is not required to prove any of the offenses for which Jones faces retrial, collateral estoppel does not apply. The district court's denial of Jones' motion to dismiss was proper.

2. Appellant Nowlin.

We also reject Nowlin's argument that his retrial on Count V of the Helena indictment is barred by collateral estoppel. The jury's convictions of Nowlin's codefendants on Counts IV, V and VI establish the existence of the conspiracies and the substantive crime.

Nowlin's acquittal on Count IV means only that the jury did not believe he joined the conspiracy to manufacture or distribute methamphetamine. Likewise, his acquittal

on Count VI must have been because the jury did not believe that he acted as a principal in the drug distribution scheme. The acquittals on Counts IV and VI were consistent with each other and would be consistent with a conviction on Count V.

The jury must have hung on Count V because they could not agree on whether Nowlin joined that conspiracy. To convict Nowlin on Count V, the government need not raise the only ultimate issues of fact decided in his favor – his lack of involvement in the drug conspiracy and the actual money laundering. No factual issue that was necessarily resolved in Nowlin's trial is inconsistent with the existence of any element of Count V. Collateral estoppel should not bar reprosecution on Count V.

III. Appellant Morris.

A. Pre-indictment delay.

Morris claims that the prosecution unduly delayed its filing of an indictment against him. The district court held that even if actual prejudice existed, there was no due process violation because the government's reasons for delay were sufficient. We review a district court's denial of a motion to dismiss on the ground of pre-indictment delay for an abuse of discretion. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1354 (9th Cir. 1989), *cert. denied*, 113 S.Ct. 419 (1992).

To establish pre-indictment delay, a defendant must show: (1) that he suffered actual, non-speculative prejudice from the delay; and (2) that the length of delay, when

balanced against the government's reasons for delay, offends fundamental conceptions of justice. *Huntley,* 976 F.2d at 1290. Morris claims he was prejudiced because he found it harder to defend himself after having obtained information about the conspiracies from the Wogamons while representing them. This made it difficult for him to establish the extent of his knowledge prior to the Wogamons' indictment. To show actual prejudice, a defendant must meet the heavy burden of showing that the prejudice was definite, and not merely speculative. *Id.* Even if the level of prejudice demonstrated by Morris were sufficient to constitute "actual prejudice," when balanced against the government's reasons for delay (i.e., that they would not indict Morris until they had a case against him), the length of delay does not offend fundamental conceptions of justice. The district court properly denied Morris' motion to dismiss.

B. Wharton's rule.

Morris challenges his conviction on Count V for conspiracy to invest income derived from violations of 21 U.S.C. §§ 841(a)(1) and 846. He claims that the count should have been dismissed on the ground that the alleged offense violates Wharton's Rule. Absent legislative intent to the contrary, Wharton's Rule bars prosecution for conspiracy when the underlying substantive crime is of such a nature as to necessarily require the participation of two people. *United States v. Castro,* 887 F.2d 988 (9th Cir. 1989). The rule applies only to "offenses requiring concerted criminal activity and congruence between the agreement and offense, such as adultery,

incest, bigamy, and dueling." *Id.* at 996. It also requires that the parties to the agreement are the only persons participating in substantive offense, that the immediate consequences of crime fall solely on the participants, and that the agreement constituting the substantive offense is unlikely to pose any treat to society which conspiracy laws are meant to prevent. *Id.* Wharton's Rule does not bar a charge of conspiracy to commit a substantive offense merely because the offense requires that defendant act as a principal. *See United States v. Huber,* 772 F.2d 585, 591 (9th Cir. 1985).

Here, the substantive offense of investing illegal profits requires only one person. While profits have to be acquired from a separate crime in which defendant acted (or would act) as principal, that is one step removed from the investment crime at issue. In addition the fact that concerted activity is not required, Morris failed to show that the alleged conspirators were the only people participating in the substantive offense, that the immediate consequences of the crime fall solely on the participants, or that an agreement to launder drug money does not pose any threat to society which conspiracy laws are meant to prevent. Thus, the district court properly denied Morris' motion to dismiss.

C. Sufficiency of Evidence.

Morris contends that the district court erred in denying his motion for acquittal on the grounds that his involvement in the criminal activity, if any, came after the conspiracies had ended. This argument essentially raises a sufficiency of evidence question on Counts I, IV, V & VI.

See e.g., United States v. Kenny, 645 F.2d 1323, 1335 (9th Cir. 1981). To determine if the evidence presented at trial is sufficient, we review the evidence in the light most favorable to the government to determine if any rational trier of fact could have found the essential elements of the offenses beyond reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992). On the three conspiracy counts, the existence of the conspiracies is not challenged. Morris merely claims he was not part of them. To prove Morris was a member of the conspiracies, the government had to show that Morris knew or had reason to know of scope of conspiracies and reason to believe his own benefits were dependent on success of the entire venture. *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990). Only a slight connection is needed to convict defendant for knowing participation. *Id.*

The government presented evidence that Morris helped launder drug money and altered documents to throw off the IRS and the grand jury investigation into the drug manufacturing and money laundering operation. In particular, the evidence showed that Morris arranged a meeting between Browning and Wogamon for the purpose of depositing one million dollars of drug sales proceeds into Shadow Mountain Systems; he filed a false Disclosure Statement to the bankruptcy court in order to hide any indication that Medallion was being used to launder drug money; he created a cover story for the receipt of $250,000 by Medallion by showing on the books that it came from the International Fuel Development Corporation, and by issuing himself 3.1 million shares of Medallion stock to cover the transaction; he

altered corporate documents with Wogamon in order to show drug proceeds as gold sales; and he threatened Browning prior to Browning's grand jury appearance in November 1986.

The evidence presented showed that his participation in the conspiracies occurred while they were ongoing, not merely afterward as he asserts. The acts of concealment used to show his participation are not like those in *Grunewald v. United States*, 353 U.S. 391 (1957), because they were part of the conspiracy to defraud the government and launder money rather than an attempt to cover up after conspiracy ended. Thus, his actions were not part of a second conspiracy as he alleges. The evidence presented, viewed in the light most favorable to the government, was sufficient to support his convictions on all counts.

IV. Appellant Wells.

Appellant Wells challenges his conviction on the ground that the district court improperly allowed the jury to hear testimony from Don Wogamon concerning Wells' arrest for possession of twenty-five pounds of methamphetamine. We review de novo a district court's denial of a motion to suppress evidence. *United States v. Miller*, 812 F.2d 1206, 1208 (9th Cir. 1987). If the district court improperly admitted the evidence, the conviction may nonetheless by [sic] sustained if the court's error was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 113 L.Ed.2d 302, 322 (1991); *United States v. Shirley*, 884 F.2d 1130, 1132 (9th Cir. 1989).

The district court had previously suppressed evidence of the methamphetamine found in the film cannister that agents executing a search at Nowlin's house removed from Wells' pocket and improperly opened. The court also suppressed the twenty-five pounds of methamphetamine subsequently seized from Wells' car. Nonetheless, in his testimony at trial, Don Wogamon referred to Wells' arrest and the twenty-five pounds of methamphetamine. These references were not elicited by the prosecutor's questions. Wogamon volunteered the information in response to unrelated questions from the prosecutor. The district judge admonished the jury to disregard Wogamon's unresponsive references to Wells' arrest and the methamphetamine involved. RT 1352-53, 1373-74.

Wells claims that Wogamon's testimony should have been excluded under the "fruit of the poisonous tree" doctrine. *See Wong Sun v. United States,* 371 U.S. 471 (1963). If, however, evidence is obtained from a source that was sufficiently independent of the illegality, it need not be suppressed. *Miller,* 812 F.2d at 1208. Wogamon knew that Wells had the methamphetamine because they had just made it together. Wells telephoned Wogamon to tell him that he had been arrested. While this probably constitutes an "independent" source, we do not have to resolve the issue because we find that any error caused by the jury's exposure to the testimony was harmless beyond a reasonable doubt.[3] The other evidence of Wells'

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[3] Since we find that Wogamon's references to Wells' arrest and the twenty-five pounds of methamphetamine were harmless beyond a reasonable doubt, it is unnecessary for us to

involvement in the charged offenses was overwhelming, and there is no reason to believe this part of Wogamon's testimony was particularly compelling or contributed to Wells' conviction. *See Fulminante,* 113 L.Ed.2d at 322.

AFFIRMED.

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decide whether the district court properly admitted the evidence under Federal Rule of Evidence 403. *See Shirley,* 884 F.2d at 1132.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM MITCHELL NOWLIN, DANIEL ALOYSIUS JONES, WILLIAM DEE MORRIS, and ROBERT WELLS, Defendants-Appellants.	Nos. 91-30429 91-30446 91-30460 91-30468 D.C. Nos. CR-90-20-H-CCL CR-90-5-BU-CCL ORDER (Filed Mar. 24, 1993)

Before: WRIGHT, FARRIS and KLEINFELD, Circuit Judges.

The petition for rehearing filed by Appellant, Robert Vaio Wells on March 15, 1993, is DENIED.